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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1236

JONES & LAUGHLIN STEEL CORPORATION, PETITIONER

v.

UNITED MINE WORKERS OF AMERICA AND JOHN L. LEWIS AS A REPRESENTATIVE MEMBER THEREOF; NATIONAL LABOR RELATIONS BOARD, AND PAUL M. HERZOG, JOHN M. HOUSTON AND GERARD D. REILLY, THE MEMBERS THEREOF; J. A. KRUG, SECRETARY OF THE INTERIOR; AND CAPTAIN N. H. COLLISSON, FEDERAL COAL MINES ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE GOVERNMENTAL RESPONDENTS[1] IN OPPOSITION

[1] The governmental respondents on whose behalf this brief is filed are Paul M. Herzog and John M. Houston, members of the National Labor Relations Board; J. A. Krug, Secretary of the Interior; and Captain N. H. Collisson, Federal Coal Mines Administrator. Process was never served on the National Labor Relations Board, and no appearance on its behalf was entered in the district court (see R. 64a–65a). The respondent Gerard D. Reilly ceased being a member of the Board on August 27, 1946, and his successor has not been substituted for him in this suit.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 188–191) is reported at 159 F. 2d 18.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 16, 1946 (R. 192). A petition for rehearing was filed on January 6, 1947 (R. 193–221) and denied on January 13, 1947 (R. 222). The petition for a writ of certiorari was filed on April 12, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior, having taken possession of petitioner's mines for the United States, was authorized to enter into and, after approval by the National Wage Stabilization Board and the President, to put into effect, an agreement recognizing a union, affiliated with the production employees' union and certified by the National Labor Relations Board as the exclusive bargaining representative for the supervisory employees at those mines, as such representative for the period of Government possession.[2]

[2] The Coal Mines Administrator, whose authority is also put in question in this proceeding, is a delegee of the Secretary of the Interior and vested with all of the powers, au-

2. Whether, in those circumstances, petitioner had standing to request (a) a judgment from the district court declaring the union without legal right to demand such recognition and (b) a decree enjoining the Secretary of the Interior from executing and performing such an agreement.

3. Whether, in such circumstances, the district court had jurisdiction to grant petitioner the relief requested.

STATUTES, EXECUTIVE ORDER, AND REGULATIONS INVOLVED

The statutes, executive order, and regulations involved are printed at pages 21 to 64 of the petition for a writ of certiorari.

STATEMENT

On May 22, 1946, pursuant to Executive Order 9728 (11 F. R. 5593; R. 15a–18a; Pet. 21–23), the respondent Krug, acting as Secretary of the Interior and on behalf of the United States, took possession of petitioner's four Pennsylvania bi-

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thority, and discretion conferred upon the Secretary by the Presidential order under which the Secretary took possession of the mines, and with all the obligations and discretion of the Coal Mines Administrator under the agreement between the Secretary, acting as Coal Mines Administrator, and the United Mine Workers of America, dated May 29, 1946 (the "Krug-Lewis agreement"). Order 2208, Secretary of the Interior, June 5, 1946, 11 F. R. 6238. The powers of the Administrator are, for purposes here relevant, coextensive with those here involved of the Secretary.

tuminous coal mines (R. 9a).[3] For many years theretofore, petitioner had operated those mines incidentally to its business of manufacturing steel and steel products (R. 4a). At all times since, the Secretary of the Interior and the Coal Mines Administrator "have been in exclusive possession * * * and in exclusive control" of the mines (R. 9a).

Approximately 135 supervisory employees and 3,000 operating and maintenance employees were employed at the mines when they were taken over by the Government (R. 6a). These 3,000 rank and file employees had for years been exclusively represented for collective bargaining purposes by the respondent United Mine Workers of America (the "UMWA") (R. 6a). The supervisory em-

[3] The executive order authorized and directed the Secretary to take possession of the bituminous coal mines of the Nation, to operate or arrange for their operation in such manner as he should deem necessary, and to do all things necessary for or incidental to the production, sale, and distribution of the coal there produced, prepared, or handled (par. 1, R. 16a, Pet. 21–22); it further authorized him to negotiate with the duly constituted representatives of the employees at the mines and to apply to the National Wage Stabilization Board for appropriate changes in the terms and conditions of employment for the period of Government operation (par. 3, R. 17a, Pet. 22); and it directed him to "recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operation of the mines" (par. 7, R. 18a, Pet. 23).

ployees had not been represented by any labor union (R. 6a). Recently, however, a majority designated as their representative the United Clerical, Technical and Supervisory Employees Union, etc. (the "UCT"), a division of the UMWA (R. 85a, 162–163).

On May 29, 1946, an agreement was entered into between the Secretary of the Interior and the UMWA establishing, subject to the approval of the National Wage Stabilization Board and the President of the United States, the terms and conditions of employment at the mines for the period of Government possession (the "Krug-Lewis agreement"—R. 42a–50a). By paragraph 11 of that agreement (R. 49a–50a), it was provided that "With respect to questions affecting the employment and bargaining status of foremen, supervisors, technical and clerical workers employed in the bituminous mining industry, the Coal Mines Administrator will be guided by the decisions and procedure laid down by the National Labor Relations Board." Several days before the execution of the agreement, on May 27, 1946, the National Labor Relations Board had issued its Certification of Representatives, certifying that the UCT had been designated by a majority of the supervisory employees at petitioner's mines as their collective bargaining representative, and that pursuant to Section 9 (a) of the National Labor Relations Act, the UCT was the exclusive representative of all such employees

for purposes of collective bargaining (R. 9a–10a).[4] Thereupon, in accordance with paragraph 11 of the Krug-Lewis agreement, the Secretary of the Interior and the Coal Mines Administrator entered into negotiations with the UCT as representative of the supervisory employees at the mines (R. 40a). It was at this juncture, on June 13, 1946, that the complaint in this action was filed (R. 3a–20a).

The complaint, seeking injunctive relief and a declaratory judgment, challenged the right of the UMWA to demand that it be recognized as exclusive bargaining representative of the supervisory employees by reason of the Labor Board's Certification, and questioned the right of the President to empower the Secretary of the Interior, without petitioner's consent, to enter into any agreement which would recognize the UMWA as exclusive representative for such employees and which would effect changes in their employment conditions (R. 11a). As to the governmental respondents, the complaint requested an injunction "forbidding the making or performance" of any such agreement (R. 14a).[5] Peti-

[4] The Certification was issued pursuant to the provisions of Section 9 (c) of the National Labor Relations Act (July 5, 1935, c. 372, § 9 (c), 49 Stat. 453, 29 U. S. C. 159 (c)) and after a hearing had been held, a Decision and Direction of Election had been issued by the Board, and an election of representatives had been conducted (R. 7a–8a, 85a, 86a–130a).

[5] No relief was requested which would directly affect the conduct of the National Labor Relations Board or its members.

tioner moved at once for a temporary restraining order and a preliminary injunction (R. 20a–21a). The application for a restraining order was denied (R. 51a). Thereupon, the governmental respondents interposed a motion to dismiss the complaint or, in the alternative, for summary judgment (R. 64a–65a); the other respondents filed a motion to dismiss (R. 60a), and, also, an answer to the motion for a preliminary injunction (R. 131a–133a). Affidavits on behalf of the various parties having been filed (R. 39a, 52a, 58a, 81a) and argument of counsel heard (see R. 135a–138a), the district court, on June 26, 1946, handed down its order denying petitioner's motion for a preliminary injunction, granting the governmental respondents' motion for a summary judgment and the other respondents' motion to dismiss, entering summary judgment for respondents, and dismissing the complaint (R. 142a–143a).

After noting its appeal to the Court of Appeals (R. 143a–144a), petitioner, on July 17, 1946, sought an injunction from that court pending determination of the appeal (R. 148, 330). Answers to the petition for an injunction pending appeal (R. 223–275, 289–328) and supplemental affidavits (see R. 234, 277, 280) were filed and comprehensive argument heard, and the Court of Appeals entered an order, on August 16, 1946,

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denying petitioner's request for an injunction and advancing the case for argument (R. 149).[6]

While the case was thus pending in the court below, the Coal Mines Administrator entered into an agreement with the UCT on July 17, 1946, limited solely to the period of Government possession and establishing certain changes in the terms and conditions of employment for the supervisory employees at petitioner's mines (R. 311–320). Simultaneously, the Coal Mines Administrator, acting pursuant to the direction of Executive Order 9728 (R. 17a, Pet. 22) and in accordance with Section 5 of the War Labor Disputes Act (June 25, 1943, c. 144, § 5, 57 Stat. 165, 50 U. S. C. App., Supp. V, 1505; Pet. 27–28), applied to the National Wage Stabilization Board[7] for an order requiring those changes, and that Board, having found the changes fair and reasonable and not in conflict with any Federal statute or executive order, ordered that, upon approval by the President, they be made effective (R. 155–157). The President approved the Board's order on August 7, 1946 (*Ibid;* R. 189), and on August 17, 1946, the day following the denial of the application for an injunction pending appeal

[6] The court stated that it was of the opinion that petitioner had "failed to make a sufficient showing of injury, or of irreparable injury, which might result to it during the interim pending determination on the merits" (R. 149).

[7] The National Wage Stabilization Board was the then successor to the National War Labor Board for purposes of Section 5 applications. Executive Order 9672, 11 F. R. 221.

in the court below, the Coal Mines Administrator issued his Order No. CMAN–12, directing that the changes in the terms and conditions of employment for the supervisory employees at petitioner's mines which were provided by the agreement with the UCT be put into effect. 11 F. R. 9085.

The agreement with the UCT provided, in part, that the union file a charge with the National Labor Relations Board against petitioner for refusing to bargain, "to the end that that company may have an opportunity to obtain a final judicial determination of the rights of supervisors at its mines under the National Labor Relations Act" (R. 319). In accordance with that provision, the UCT filed such a charge on August 22, 1946 (R. 159–160), a complaint was issued by the Labor Board (R. 160–164), an answer filed by petitioner (R. 165–169), a hearing held, and a final order issued by the Board on December 30, 1946, directing petitioner to recognize the UCT as exclusive representative of the supervisory employees. A petition for enforcement of that order was filed in the Third Circuit Court of Appeals, where it is now pending (Pet. 5).

Meanwhile, on December 16, 1946, the court below had announced its decision in this case, affirming the judgment of the district court (R. 188–191), and judgment to that effect was entered on December 16, 1946 (R. 192).

ARGUMENT

The Court of Appeals, conceiving that the single issue before it for determination was the Government's authority to establish changes in terms and conditions of employment in mines in its possession (R. 189), held that such authority was amply supplied by statute and by the very nature of Government possession (R. 190). Reading the existing agreement with the UCT (R. 311–320) as in effect recognizing that union as exclusive bargaining representative for the supervisory employees at petitioner's mines and the Wage Stabilization Board's order of approval (R. 155–157) as sanctioning such recognition, it held such action authorized and petitioner in no position to complain (R. 190).[8] It felt no

[8] The contract with the UCT provided, among other things, for a check-off of union dues (R. 315–316) and the settlement of disputes through negotiation with union representatives (R. 312–313, 317–318). The agreement also contained the following provision: "With respect to recognition of the Union as the sole and exclusive agency and representative of the supervisory employees, the Coal Mines Administrator will be guided by the decisions and procedure laid down by the National Labor Relations Board" (R. 315). Respondents viewed the agreement as one in effect recognizing the UCT as the exclusive bargaining agent for the supervisors (see R. 296) and interpreted the order of the Wage Stabilization Board (R. 155–157), approving the check-off and grievance procedures there provided, as, in substance, sanctioning such recognition. The court below agreed with respondents' construction (R. 189, 190). Petitioner, however, insists that the contract with the UCT did not constitute recognition of the union as exclusive bargaining representative and sug-

need to pass on the propriety of the Labor Board's certification or on the legal status of the union under that certification (R. 189).

Putting aside considerations as to whether the district court had jurisdiction to grant the relief requested, we submit that the judgment of the court below was clearly correct and that no review by this Court is warranted.

1. The authority of the Secretary of the Interior to extend recognition to the UCT or any other union representing employees at petitioner's mines is expressly supplied by statute and executive order. Petitioner's mines were taken over by the United States pursuant to Presidential order issued, in part, pursuant to the provisions of Section 9 of the Selective Training and Service Act of 1940, as amended by Section 3 of the War Labor Disputes Act (September 16, 1940, c. 720, § 9, 54 Stat. 892, as amended June 25, 1943, c. 144, § 3, 57 Stat. 164; 50 U. S. C. App., Supp. V, 309; Pet. 24–27). That Section enabled the President, under certain specified conditions, to take possession of any mine for "use and operation by the United States or in its interests."

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gests that as an important consideration here (Pet. 10–11, 12). We cannot appreciate its significance. If petitioner's view of the agreement is the correct one, it has nothing to complain of. For there is no showing that the Government officers or the unions involved intend to enter into any contract more definite as to recognition than the one now extant; to the contrary, there appears to be an intention not to do so (see R. 40a–41a).

Section 5 of the War Labor Disputes Act (June 25, 1943, c. 144, § 5, 57 Stat. 165; 50 U. S. C. App., Supp. V, 1505; Pet. 27–28), in turn, authorized the Government agency operating a mine so taken to apply to the National War Labor Board [9] "for a change in wages or other terms or conditions of employment" and empowered the Board to "order any changes in such wages, or other terms and conditions, which it deems to be fair and reasonable and not in conflict with any Act of Congress or any Executive order issued thereunder," which order, upon approval by the President, was to become binding on the operating agency. Executive Order 9728 (11 F. R. 5593; R. 15a–18a; Pet. 21–23), under which the Secretary was acting with respect to petitioner's mines, reiterated the vesting of such authority in him.

These grants of power—the very statutes and the very executive order involved here—were only recently considered in *United States* v. *United Mine Workers of America,* No. 759, this Term, March 6, 1947. This Court there found that in enacting Section 3 of the War Labor Disputes Act, *supra,* "Congress intended that by virtue of Government seizure, a mine should become, for purposes of production and operation, a Government facility in as complete a sense as if the

[9] At the time of the commencement of this action, to the successor National Wage Stabilization Board. See note 7, p. 8, *supra.*

Government held full title and ownership" (*Id.*, per Vinson, C. J., slip copy, p. 23) and referred with apparent approval to the Government's utilization of the procedures of Section 5 of the Act, *supra,* to bring about changes in employment conditions at Government-possessed mines (*Id.*, pp. 24, 25).[10] In the light of the Court's recent opinion in that case, there is no question that the Secretary of the Interior had the authority to take the action challenged here.

Nor is there anything startling in these grants of power. They constitute no more than an application to properties seized during wartime, of the established authority in the Government, without restriction, to conduct its business and operate its property with whomsoever and upon whatever terms and conditions it desires. See *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 127; *Ken-Rad Tube and Lamp Corp.* v. *Badeau,* 55 F. Supp. 193, 197 (W. D. Ky.). Obviously, where the drastic power of seizure is employed by the Government to avoid or terminate interruptions in industry consequent upon labor disturbances, the Government officers in charge must be permitted to negotiate with the labor representatives involved and to make changes in the existing working conditions. To withhold that power from the Government agency made responsible for the operation of Government-possessed plants might pre-

[10] Compare the concurring and dissenting opinion of Black and Douglas, JJ., slip copy, p. 3.

vent it from eradicating the roots of the labor disturbances which initially compelled Government seizure and thus frustrate the Congressional purposes. See *American Economic Mobilization* (1942), 55 Harv. L. R. 427, 527.

2. Contrary to petitioner's suggestion, the power of the Secretary in respect of employees is not restricted by the National Labor Relations Act. Petitioner is, of course, mistaken when it contends that a labor union, so certified by the National Labor Relations Board, is not qualified to demand recognition as the exclusive representative for supervisory employees until all the proceedings before the Board and courts which are provided by Section 10 of the National Labor Relations Act (July 5, 1935, c. 372, 49 Stat. 453, as amended, 29 U. S. C. 160) have first been exhausted. There is nothing in that Act which prohibits the execution and effectuation of an agreement of recognition with the UCT, or which prohibits the union from demanding such recognition. The "right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer * * * is a fundamental right" which is theirs independently of the National Labor Relations Act. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33. And a labor union may achieve the status of exclusive employee representative by contract with the em-

ployer notwithstanding the absence of Labor Board certification or proceeding.[11]

When petitioner had possession of its mines, whether or not the Labor Board had certified the UCT as exclusive representative for its supervisors and whether or not such certification, if issued, were valid, it could have so recognized the union. Petitioner says, however, that the Secretary of the Interior, who now has possession of the mines on behalf of the United States, cannot do the same thing, without petitioner's consent. But, as the court below has held: "The Government, in its capacity as operator of the mines, stands on an equal footing so far as the period of Government operation is concerned" (R. 190). Cf. *United States* v. *United Mine Workers of America, et al., supra.* To hold that notwithstanding Government seizure, Government officers must wait on the mine owners' acquiescence before changing working conditions in the mines would be to reduce the act of Government possession to no more than a futile gesture and to frustrate its purpose—the liberation of the economy from interruptions consequent upon labor disturbances.

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[11] "* * * While the National or State labor boards are frequently asked to make determinations on which union has a majority, it is possible, of course, for the union and employer to agree on exclusive recognition or even a closed shop without the question being referred to a Government agency for determination." U. S. Dept. of Labor, *Union Agreement Provisions*, H. Doc. No. 723, 77th Cong., 2d Sess., p. 24.

The certification issued by the National Labor Relations Board is irrelevant to the issues in this suit. The Secretary of the Interior might have recognized the UCT as exclusive bargaining agent without requiring that it be certified as such; that, by paragraph 11 of the Krug-Lewis agreement (R. 49a–50a), he did make Labor Board action a prerequisite to recognition is of no significance here. There is no provision, either in the statute or executive order, requiring resort to the Labor Board; reference to the Labor Board is entirely optional. This is plainly not that type of suit which appropriately poses the question heretofore reserved by this Court and which petitioner now asks this Court to decide—whether the Act has excluded judicial review of a certification under Section 9 (c) by an independent suit brought in the district courts. *American Federation of Labor* v. *N. L. R. B.*, 308 U. S. 401, 412; *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 699–700. For, since any agreement into which the Secretary of the Interior has entered or can enter can be effective, as petitioner itself acknowledges (R. 12a–13a), only for the period of Government possession and can be binding only on the Government and not on petitioner, except with its consent, the Secretary's reliance on the certification, such as it is, can in no event result in legal injury to petitioner.[12]

[12] If the propriety of the certification were properly before the Court, its validity would not seem to be open to serious

3. The ruling of the court below, upholding the Government's authority, is so clearly correct that it seems superfluous to consider the jurisdictional obstacles to this suit. The district court's lack of jurisdiction should, however, be noted.

It is clear, initially, that petitioner has not sustained and cannot sustain any injury to any of its legally protected interests by virtue of an agreement whereby the Government recognized the UCT. Any such agreement, as we have already noted (*supra,* p. 16), can be maintained in effect only so long as the Government remains in possession of the mines and can in no way bind petitioner. "Case or controversy" under the Constitution, a prerequisite to Federal jurisdiction, is, therefore, lacking. See *Coffman* v. *Breeze Corporations,* 323 U. S. 316, 324; *Ashwander* v. *T. V. A.,* 297 U. S. 288, 324.[13]

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question in the light of the recent decision in *Packard Motor Car Co.* v. *N. L. R. B.*, No. 658, this Term, March 10, 1947.

[13] Petitioner can claim no better standing by virtue of statute. Section 5 of the War Labor Disputes Act (50 U. S. C. App., Supp. V, 1505; Pet. 27–28) affords owners of property taken over by the Government no right to be heard to complain of changes in employment conditions effected there pursuant to that section. The proviso in Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892), "That nothing herein shall be deemed to render inapplicable existing State or Federal laws concerning the health, safety, security, and employment standards of the employees * * *" in plants in Government possession, was intended to protect only such rights as employees might have

Second, since petitioner's mines are now in the Government's possession, this suit, brought against officials of the United States in their official capacity to enjoin them from establishing conditions relating to employment practices in those mines, is, in substance, a suit against the United States. *Wells* v. *Roper,* 246 U. S. 335; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Minnesota* v. *Hitchcock,* 185 U. S. 373.

Third, the action invites judicial intervention, the effect of which may be to slow down the work of the mines and to impede the conversion of the Nation's economy from a war to a peacetime basis; and the courts, reluctant to control the executive discretion in normal times and as to ordinary functions (*Adams* v. *Nagle,* 303 U. S. 532, 540; *United States ex rel. Greathouse* v. *Dern,* 289 U. S. 352, 360; *United States* v. *Interstate Commerce Commission,* 294 U. S. 50), certainly will not be moved to control executive discretion in the circumstances of this case.

4. Moreover, the authority of the Secretary of the Interior which petitioner questions in this case will, in the absence of additional legislation, terminate on June 30, 1947. By virtue of the Presidential proclamation respecting termination of hostilities (Proclamation No. 2714, December 31, 1946, 12 F. R. 1), the provisions of the War

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had prior to Government possession, not to create rights in employers. See Sen. Wagner, 86 Cong. Rec. 11095, August 28, 1940.

Labor Disputes Act cease to be effective on that day. Section 10, War Labor Disputes Act (June 25, 1943, c. 144, § 10, 57 Stat. 168; 50 U. S. C., Supp. V, 1510). By June 30, 1943, the possession of petitioner's mines will be returned to petitioner (Section 3, War Labor Disputes Act, June 25, 1943, c. 144, § 3, 57 Stat. 164; 50 U. S. C. App., Supp. V, 1503), and any and all agreements made by the Government with the UMWA and the UCT will terminate.

CONCLUSION

The decision of the court below is correct, and there exists no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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